Baharul Azman bin Omar (as litigation representative for the deceased, Khadijah bt Hj Puteh) & Ors v Zulhasmi bin Zakaria & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCVC-10–01 OF 2018
KENNETH ST JAMES JC
27 APRIL 2023

Tort — Negligence — Duty of care — Plaintiffs sued defendants, as their solicitors, for paying out entire compensation sum solely to one of beneficiaries, and for deducting sum as legal fees and expenses — Whether defendants owed duty of care to plaintiffs — Whether there was solicitor-client relationship between defendants and plaintiffs — Whether defendants breached their duty of care — Whether defendants were liable for damages — Whether aggravated and exemplary damages should be ordered against defendants

The plaintiffs ('P1' and 'P3') were two of the ten beneficiaries of the estate of Omar bin Arshad ('the estate'). From about 1994, there was a land acquisition exercise involving the estate's land. There were allegations of wrongdoing related to the acquisition. In 2007, the estate filed a suit against the authorities and persons whom the estate asserted caused loss and harm to the estate in the land acquisition exercise ('Suit 130'). The firm of solicitors initially on record for the plaintiff in Suit 130 was Tetuan Mohd Zawahid & Co ('Tetuan Zawahid'). The advocate and solicitor practicing in Tetuan Zawahid who acted for the plaintiff in Suit 130 was the first defendant ('D1'). D1 then left Tetuan Zawahid and joined the second defendant ('D2'). Later, D2 took over the conduct of Suit 130 from Tetuan Zawahid. Suit 130 resulted in the outcome where the estate was granted RM350,000 in compensation ('the RM350,000 compensation money'). Instead of paying the RM350,000 compensation money to the estate or to the beneficiaries of the estate, the defendants paid RM295,000 out of the RM350,000 compensation money to Baharul Azhar bin Omar ('Baharul Azhar'), who was one of the beneficiaries of the estate. Also, the defendants retained the balance RM55,000 for themselves, as fees and expenses. None of the RM350,000 reached any of the other beneficiaries of the estate. Baharul Azhar kept the RM295,000 that was released to him, for himself. The plaintiffs sued the defendants for negligence — for paying RM295,000 to Baharul Azhar, and retaining RM55,000 as fees and expenses, without the consent of the beneficiaries.

Held, allowing the claim:

(1) The defendants owed a duty of care to the plaintiffs, as there was a solicitor-client relationship between them and the plaintiffs. The plaintiff in Suit 130 was clearly not Baharul Azhar in his personal capacity. The plaintiff was the estate, and Baharul Azhar was named only as the representative of the beneficiaries of the estate. Further, since it was D1 who prepared the statement of claim, together with En Mohd Zawahid, D1 knew or should have known that the plaintiff in Suit 130 was the estate (the beneficiaries), not Baharul Azhar. Next, D1 sighted the *Sijil Faraid* for the estate and hence had the knowledge that the estate had ten beneficiaries which included the plaintiffs. In 2005, it was the beneficiaries, through Baharul Azhar, who appointed Tetuan Zawahid to represent them. The beneficiaries were the clients, not Baharul Azhar alone. Thus, it was reasonable to conclude that the defendants took over the conduct of the case from Tetuan Zawahid on the same terms of representation as for Tetuan Zawahid. As the two letters by Baharul Azahar to his fellow beneficiaries for their contribution to pay the defendants' bill were extended to D2, the defendants knew or should have known that the beneficiaries were paying for their services ie paying their bill. The two letters inferred and imputed on the defendants a solicitor-client relationship with the beneficiaries. The defendants' plea that they were appointed by Baharul Azhar; that they took instructions from and communicated only with Baharul Azhar; that they owed no duty of care to the plaintiffs were untenable. The defendants owed a duty of care to the plaintiffs to protect the plaintiffs' interests and rights over the RM350,000 compensation money, as there was a solicitor-client relationship between them (see paras 29, 32, 34–35, 41, 45, 48 & 52–54).

(2) The defendants breached their duty of care when they paid the RM350,000 compensation money to Baharul Azhar and deducted their own fees. Even though D2 acknowledged that the RM350,000 compensation money belonged to the beneficiaries, the defendants nevertheless chose to release RM295,000 to Baharul Azhar. This conduct was either a negligent act or a negligent omission. It was a negligent act in the sense that the defendants should have protected the interests of the respective beneficiaries (who were their clients) over the compensation money, but they did not. It was a negligent omission in the sense that the defendants failed to protect the beneficiaries' rights to the compensation money. Further, although the beneficiaries notified the defendants about their rights to the RM350,000 compensation money, the defendants ignored their notice. The defendants did not produce any evidence to prove, or for an inference to be drawn, that they were instructed by the beneficiaries to take instructions only from Baharul Azhar, or that they were authorised to release any monetary remedy from Suit 130 solely to Baharul Azhar. There was no documentary nor oral evidence that the

defendants procured the beneficiaries' consent to deduct RM55,000 from the RM350,000 compensation money as legal fees and expenses. There was also no bill for the RM55,000 for legal fees and expenses. Paying the RM295,000 solely to Baharul Azhar was a breach of the defendants' reasonable duty of care (see paras 55, 57–59, 67, 70, 73 & 88).

(3) As the defendants were negligent, it followed that they were liable to the plaintiffs for damages. Accordingly, RM43,750 was awarded for P1 and RM40,833.33 for P3. To prosecute Suit 130, P1 paid RM1,800 and P3 paid RM300. The interest for the benefit of the plaintiffs was ordered at 5%pa on the respective amounts, to be calculated from 9 December 2011 to the date of full payment. For general damages, the plaintiffs did not produce or give any evidence of the quantum of damages that they suffered. As there was no evidence of any suffering, each P1 and P3 was awarded RM1,000 as nominal damages (see paras 91, 94–96 & 99–100).

(4) The defendants had exhibited or demonstrated no bad or dishonourable conduct against the plaintiffs. There was no evidence nor ground to invoke the exceptional measure of ordering aggravated damages as an additional remedy. Therefore, no award for aggravated damages was made (see paras 106 & 108).

(5) There was no such 'very exceptional circumstance' that warranted an award of exemplary damages against the defendants. The defendants had to be given the opportunity, in fact, the right, to vigorously defend their position against the plaintiffs' claim. And so the defendants should not be punished for it (see paras 112 & 114)

[Bahasa Malaysia summary

Plaintif ('P1' dan 'P3') adalah dua daripada sepuluh benefisiari harta pusaka Omar bin Arshad ('harta pusaka'). Dari kira-kira 1994, terdapat proses pengambilan tanah yang melibatkan tanah harta pusaka. Terdapat dakwaan salah laku yang berkaitan dengan pengambilan itu. Pada tahun 2007, harta pusaka memfailkan saman terhadap pihak berkuasa dan orang yang harta pusaka menegaskan menyebabkan kerugian dan kemudaratan kepada harta pusaka dalam proses pengambilan tanah ('Saman 130'). Firma peguamcara pada mulanya dalam rekod untuk plaintif dalam Saman 130 ialah Tetuan Mohd Zawahid & Co ('Tetuan Zawahid'). Peguambela dan peguamcara yang beramal di Tetuan Zawahid yang bertindak untuk plaintif dalam Saman 130 adalah defendan pertama ('D1'). D1 kemudian meninggalkan Tetuan Zawahid dan menyertai defendan kedua ('D2'). Kemudian, D2 mengambil alih pengendalian Saman 130 daripada Tetuan Zawahid. Saman 130 menghasilkan keputusan di mana harta pusaka telah diberikan pampasan RM350,000 ('wang pampasan RM350,000'). Daripada membayar wang pampasan RM350,000 kepada harta pusaka atau kepada benefisiari harta

pusaka, defendan membayar RM295,000 daripada wang pampasan RM350,000 kepada Baharul Azhar bin Omar ('Baharul Azhar'), yang merupakan salah seorang benefisiari harta pusaka. Selain itu, defendan mengekalkan baki RM55,000 untuk diri mereka sendiri, sebagai yuran dan perbelanjaan. Tiada satu pun daripada RM350,000 itu mencapai mana-mana benefisiari lain harta pusaka. Baharul Azhar menyimpan wang RM295,000 yang dilepaskan kepadanya, untuk dirinya sendiri. Plaintif menyaman defendan kerana cuai — kerana membayar RM295,000 kepada Baharul Azhar, dan mengekalkan RM55,000 sebagai yuran dan perbelanjaan, tanpa kebenaran benefisiari.

Diputuskan, membenarkan tuntutan:

(1) Defendan mempunyai kewajipan berjaga-jaga kepada plaintif, kerana terdapat hubungan peguamcara-klien antara mereka dan plaintif. Plaintif dalam Saman 130 jelas bukan Baharul Azhar atas kapasiti peribadinya. Plaintif adalah harta pusaka, dan Baharul Azhar dinamakan hanya sebagai wakil benefisiari harta pusaka. Tambahan pula, memandangkan D1 yang menyediakan penyataan tuntutan, bersama En Mohd Zawahid, D1 tahu atau sepatutnya tahu bahawa plaintif dalam Saman 130 adalah harta pusaka (benefisiari), bukannya Baharul Azhar. Seterusnya, D1 melihat Sijil Faraid untuk harta pusaka dan dengan itu mengetahui bahawa harta pusaka itu mempunyai sepuluh benefisiari termasuk plaintif. Pada 2005, benefisiari melalui Baharul Azhar telah melantik Tetuan Zawahid untuk mewakili mereka. Benefisiari adalah merupakan klien, bukan Baharul Azhar sahaja. Oleh itu, adalah munasabah untuk membuat kesimpulan bahawa defendan mengambil alih pengendalian kes daripada Tetuan Zawahid atas syarat representasi yang sama seperti Tetuan Zawahid. Memandangkan dua surat Baharul Azahar kepada benefisiari untuk sumbangan mereka untuk membayar bil defendan telah dilanjutkan kepada D2, defendan tahu atau sepatutnya tahu bahawa benefisiari membayar perkhidmatan mereka iaitu membayar bil mereka. Kedua-dua surat itu memberi kesimpulan dan mengaitkan defendan satu hubungan peguamcara-klien dengan benefisiari. Alasan defendan bahawa mereka dilantik oleh Baharul Azhar; bahawa mereka mengambil arahan dan berkomunikasi hanya dengan Baharul Azhar; bahawa mereka tidak mempunyai kewajipan berjaga-jaga kepada plaintif tidak dapat dipertahankan. Defendan mempunyai kewajipan berjaga-jaga terhadap plaintif untuk melindungi kepentingan dan hak plaintif ke atas wang pampasan RM350,000, kerana terdapat hubungan peguamcara-klien antara mereka (lihat perenggan 29, 32, 34–35, 41, 45 , 48 & 52–54).

(2) Defendan melanggar kewajipan berjaga-jaga mereka apabila mereka membayar wang pampasan RM350,000 kepada Baharul Azhar dan menolak yuran mereka sendiri. Walaupun D2 mengakui wang pampasan

RM350,000 itu milik benefisiari, defendan bagaimanapun memilih untuk melepaskan RM295,000 kepada Baharul Azhar. Perlakuan ini adalah sama ada tindakan cuai atau peninggalan kecuaian. Ia adalah satu tindakan cuai dalam erti kata bahawa defendan sepatutnya melindungi kepentingan benefisiari masing-masing (yang merupakan klien mereka) atas wang pampasan, tetapi mereka tidak melakukannya. Ia adalah peninggalan kecuaian dalam erti kata defendan gagal melindungi hak benefisiari ke atas wang pampasan. Selanjutnya, walaupun benefisiari memberitahu defendan tentang hak mereka terhadap wang pampasan RM350,000, defendan tidak mengendahkan notis mereka. Defendan tidak mengemukakan apa-apa bukti untuk membuktikan, atau untuk membuat inferens, bahawa mereka telah diarahkan oleh benefisiari untuk mengambil arahan hanya daripada Baharul Azhar, atau bahawa mereka diberi kuasa untuk melepaskan sebarang remedi kewangan daripada Saman 130 semata-mata kepada Baharul Azhar. Tiada keterangan dokumentari mahupun lisan bahawa defendan mendapatkan persetujuan benefisiari untuk menolak RM55,000 daripada wang pampasan RM350,000 sebagai yuran dan perbelanjaan guaman. Juga tiada bil untuk RM55,000 untuk yuran guaman dan perbelanjaan. Membayar RM295,000 semata-mata kepada Baharul Azhar adalah pelanggaran kewajipan sewajarnya defendan (lihat perenggan 55, 57–59, 67, 70, 73 & 88).

(3) Oleh kerana defendan cuai, ia berikutan bahawa mereka bertanggungjawab kepada plaintif untuk ganti rugi. Sehubungan itu, RM43,750 telah dianugerahkan untuk P1 dan RM40,833.33 untuk P3. Untuk membuat dakwaan Saman 130, P1 membayar RM1,800 dan P3 membayar RM300. Faedah untuk kepentingan plaintif telah diperintahkan pada 5% setahun ke atas jumlah masing-masing, yang akan dikira dari 9 Disember 2011 hingga tarikh pembayaran penuh. Bagi ganti rugi am, plaintif tidak mengemukakan atau memberikan sebarang keterangan tentang kuantum ganti rugi yang mereka alami. Oleh kerana tiada keterangan tentang sebarang penderitaan, setiap P1 dan P3 telah diberikan RM1,000 sebagai ganti rugi nominal (lihat perenggan 91, 94–96 & 99–100).

(4) Defendan telah tidak mempamerkan atau menunjukkan kelakuan buruk atau mengaibkan terhadap plaintif. Tiada keterangan atau alasan untuk menggunakan langkah luar biasa untuk memerintahkan ganti rugi teruk sebagai remedi tambahan. Oleh itu, tiada award untuk ganti rugi teruk dibuat (lihat perenggan 106 & 108).

(5) Tiada 'keadaan yang sangat luar biasa' yang memerlukan penganugerahan ganti rugi teladan terhadap defendan. Defendan perlu diberi peluang, hakikatnya, hak, untuk bersungguh-sungguh mempertahankan kedudukan mereka terhadap tuntutan plaintif. Oleh

itu, defendan tidak sepatutnya dihukum kerananya (lihat perenggan 112 & 114).]

Cases referred to

Big Junkyard Sdn Bhd & Anor v Chan Kah Wai [2022] MLJU 2923; [2023] 1 CLJ 564; [2022] AMEJ 1566, HC (folld)

Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals [2015] 1 MLJ 773; [2015] 2 AMR 1; [2015] 1 CLJ 719, FC (refd)

Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors And Another Appeal [2005] 6 MLJ 540; [2005] 5 AMR 185; [2005] 3 CLJ 753, CA (refd)

Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practising as Chiang Chambers, Advocates and Solicitors) [2021] 3 MLJ 505; [2021] 3 CLJ 237; [2020] AMEJ 1892, CA (folld)

Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571; [1978] 3 WLR 167; [1979] Ch 384, ChD (folld)

Rookes v Barnard [1964] 1 All ER 367; [1964] AC 1129; [1964] 2 WLR 269, HL (refd)

Wong Kiong Hung & Anor v Chang Siew Lan & Anor Appeal [2009] 4 MLJ 183; [2009] 4 AMR 64; [2009] 3 CLJ 751, CA (refd)

Roshidah Osman (with Siti Azizah Mulian) (Roshidah Osman & Partners) for the first and third plaintiffs.
The first defendant appearing in person.
Mohd Adlizan Mohd Noor (Termizi & Co) for the second defendant.

Kenneth St James JC:

PRELUSION

[1] The plaintiffs are the beneficiaries of the estate of Omar bin Arshad ('estate'). In an earlier case, the estate ie the beneficiaries were granted RM350,000 in compensation ('the RM350,000 compensation money').

[2] The first defendant ('D1') was the advocate and solicitor who had the conduct of the earlier case. The second defendant ('D2') was the firm of solicitors on record for the plaintiffs in the earlier case. D1 practised law in D2.

[3] Instead of paying the RM350,000 compensation money to the estate or to the beneficiaries of the estate, the defendants paid RM295,000 out of the RM350,000 compensation money to Baharul Azhar bin Omar ('Baharul Azhar'), who is one of the beneficiaries of the estate. Also, the defendants retained the balance RM55,000 for themselves, as fees and expenses.

[4] The plaintiffs sued the defendants for negligence — for paying

RM295,000 to Baharul Azhar, and retaining RM55,000 as fees and expenses, without the consent of the beneficiaries.

[5] The plaintiffs seek RM1m in general damages, RM200,000 in aggravated damages and RM300,000 in exemplary damages.

THE DEFENDANTS' DEFENCE

[6] In their defence, the defendants pleaded that:

(a) they were appointed by Baharul Azhar;

(b) they took instructions from and communicated only with Baharul Azhar; and

(c) they owed no duty of care to the plaintiffs.

THE ISSUES TO BE TRIED

[7] The agreed issues to be tried are:

(a) whether the defendants owed a duty of care to the plaintiffs;

(b) whether the defendants breached that duty of care by paying RM295,000 out of the RM350,000 compensation money to Baharul Azhar, and retaining RM55,000 as legal fees and expenses, without the consent of the other beneficiaries of the estate; and

(c) if the defendants breached the duty of care, how much damages are they entitled to?

A FEW PRELIMINARY MATTERS

[8] A few preliminaries:

(a) the second and fourth plaintiffs discontinued their claims before the trial. The first plaintiff (P1) and the third plaintiff (P3) pursued their claims. I will refer to P1 and P3 together as 'the plaintiffs';

(b) I will refer to the first defendant (Zulhazmi bin Zakaria) as D1, and the second defendant firm of solicitors (Tetuan Termizi & Co) as D2; and

(c) I will refer to D1 and D2 together as D1D2.

[9] The trial took five days to finish.

[10] The list of witnesses who testified at the trial is set out here:

PW1	Baharul Azman bin Omar	BAHARUL
PW2	Mohd Zawahid bin Ya	ZAWAHID
PW3	Siti Noor Halma bt Omar	NOOR
DW1	Zulhazmi bin Zakaria	ZUL
DW2	Ahmad Termizi bin Abdullah	AHMAD
DW3	Mohamed Redzuan bin Idrus	REDZUAN

THE PERTINENT FACTS

[11] The plaintiffs are two of the ten beneficiaries of the estate.

[12] From about 1994, there was a land acquisition exercise involving the estate's land. There were allegations of wrongdoing related to the acquisition.

[13] In 2007, the estate filed a suit against the authorities and persons whom the estate asserted caused loss and harm to the estate in the land acquisition exercise. The suit was Penang High Court Civil Suit No 22–130 of 2007 (Suit 130).

[14] In the intitulement of Suit 130, the plaintiff was stated as 'Harta Pesaka Allahyarham Hj Omar bin Arshad @ Omar bin Chat (melalui Hj Baharul Azhar bin Omar sebagai wakil waris-waris yang sah)'.

[15] The firm of solicitors initially on record for the plaintiff in Suit 130 was Tetuan Mohd Zawahid & Co (Tetuan Zawahid). The Advocate and Solicitor practicing in Tetuan Mohd Zawahid & Co who acted for the plaintiff in Suit 130 was D1.

[16] D1 then left Tetuan Zawahid and joined D2. Later, D2 took over the conduct of Suit 130 from Tetuan Zawahid, and D2 had conduct of Suit 130 again.

[17] It suffices for the purpose of this judgment to say that Suit 130 resulted in the outcome where the estate was granted the RM350,000 compensation money. The court order for this RM350,000 compensation sum was recorded in August 2010 (on 25 August 2010). D2 was, at the time, on record as the solicitors for the plaintiff in Suit 130. And D1 was the Advocate and Solicitor who had conduct of the case.

[18] In December 2011, RM295,000 was paid out to Baharul Azhar. The balance RM55,000 was retained by D1D2.

[19] None of the RM350,000 reached any of the other beneficiaries of the

estate. Baharul Azhar kept the RM295,000 that was released to him, for himself.

[20] A few of the other beneficiaries, including the plaintiffs, sued Baharul Azhar for their share of the compensation money. The High Court found in their favour. Baharul Azhar appealed to the Court of Appeal. The Court of Appeal dismissed his appeal. But Baharul Azhar refused to pay the other beneficiaries their share of the money.

[21] The plaintiffs blame D1D2 for not getting their share of the compensation money. They hence sued D1D2 for negligence.

FIRST ISSUE — DID D1D2 OWE A DUTY OF CARE TO THE PLAINTIFFS?

[22] Whether D1D2 owed a duty of care to the plaintiffs swivels around the question of whether there was a solicitor-client relationship between D1D2 and the beneficiaries. In other words, whether D1D2's client was Baharul Azhar, or the beneficiaries.

First Issue: Duty of care — the pertinent principles on duty of care and the solicitor-client relationship

[23] To glean the applicable and pertinent principles in a claim of negligence against an advocate and solicitor, I am both guided and bound by the judgment of the Court of Appeal in *Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practising as Chiang Chambers, Advocates and Solicitors)* [2021] 3 MLJ 505; [2021] 3 CLJ 237; [2020] AMEJ 1892 (CA), which cited the Court of Appeal case of *Wong Kiong Hung & Anor v Chang Siew Lan & Anor Appeal* [2009] 4 MLJ 183; [2009] 4 AMR 64; [2009] 3 CLJ 751 (CA), and the Federal Court case of *Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals* [2015] 1 MLJ 773; [2015] 2 AMR 1; [2015] 1 CLJ 719 (FC).

[24] *Lee Kuang Guat* was a case where an advocate and solicitor filed a personal injury suit for the plaintiff, whose daughter died in a vehicular accident. The advocate and solicitor took instructions to file a suit from a tout. The advocate and solicitor never met the plaintiff. The advocate and solicitor did not collect any deposit for fees and expenses. The plaintiff did not issue a warrant to act to the advocate and solicitor. The advocate and solicitor filed the suit nevertheless.

[25] As it turned out, the suit was struck out because the advocate and solicitor did not attend the first case management before the registrar. The

plaintiff then filed suit against the advocate and solicitor for negligence. The High Court held that the advocate and solicitor was not negligent. The High Court found that there was no solicitor-client relationship between the parties. The Court of Appeal, however, reversed the decision of the High Court. The Court of Appeal found that there was a solicitor-client relationship between the parties.

[26] From *Lee Kuang Guat*, I gleaned the following propositions:

(a) there are four criteria for a claim of negligence against an advocate and solicitor:

(i) the advocate and solicitor owes a duty of care to the client;

(ii) there is a breach of that duty of care;

(iii) the breach caused loss or damage to the client; and

(iv) the damage is not too remote ie it is a foreseeable consequence of the breach.

(b) there is a duty of care when there is a solicitor-client relationship; and

(c) the solicitor-client relationship can be express or implied.

[27] In *Lee Kuang Guat*, the Court of Appeal, through Justice Nantha Balan JCA, enunciated:

> [76] As for the issue of negligence, the learned judge [note: trial court] opined as follows:
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> Whether the second defendant is liable for the tort of negligence
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> [62] In *Wong Kiong Hung & Anor v Chang Siew Lan & Another Appeal* [2009] 4 MLJ 183; [2009] 3 CLJ 751, Low Hop Bing JCA held:
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> [27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:
>
> (1) the solicitor owes the client a *duty of care*
>
> (2) there is a *breach* of that duty by the solicitor;
>
> (3) the client has thereby suffered *damage* and
>
> (4) the damage is *not too remote* a consequence of the breach.
>
> Whether the second defendant owes the plaintiff a duty of care
>
> [63] *Since the court has found that a solicitor and client relationship exists* between the second defendant and the plaintiff, it is without doubt that *the second defendant owes the plaintiff a duty of care* in its discharge of its professional duties as a solicitor ...
>
> [77] ...we think that it is also highly relevant to refer to the case of *Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals* [2015] 1 MLJ 773;

A [2015] 1 CLJ 719; [2015] 2 AMR 1 (FC) where the Federal Court opined that the facts and circumstances attendant upon the event or occasion could give rise to an implied solicitor-client relationship and once there is such a relationship, then all the relevant duties and obligations which are attendant upon that relationship will fall on the shoulders of the solicitor.

B [78] The opinion of the Federal Court is to be found in the following paragraphs:

> Solicitor-Client Relationship
>
> [36] A solicitor-client relationship may arise either:
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> (a) by an express agreement between a solicitor and a client; or (b)where there is express assertion by a solicitor to act for the client; or
>
> (b) it may be implied.
>
> [37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:
>
> (a) that the purported client has sought for advice or assistance from the solicitor;
>
> (b) that the assistance sought for was within the professional competence of the solicitor;
>
> (c) that the solicitor expressly or impliedly agreed to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and
>
> (d) that *it was reasonable for the purported client to believe that the solicitor was representing him*.
>
> [38] *It is therefore a matter of evidence to determine whether a solicitor-client relationship exists*. Hence, *it is essential to consider such evidence adduced including the words and conduct of the parties* towards each other ...
>
> [41] It has been held that 'the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer must be in writing. It may be oral. *It may be implied by the conduct of the parties in the particular case*'.
>
> [43] *Once a solicitor-client relationship exists and thus a retainer, it 'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interests' of his client 'in matters to which the retainer relates by all proper means'*. (Emphasis added.)

I **[28]** Further, I am also guided by the UK case law authority on the negligence of solicitors of *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571; [1978] 3 WLR 167; [1979] Ch 384, at All ER p 596, paras a-b, where Oliver J of the Chancery Division propounded that a solicitor has a duty to 'exercise that care and skill on which they must have

known perfectly well that their client relied'. In other words, solicitors have a duty 'not to injure their client by failing to do that which they had undertaken to do' and which the clients 'relied on them to do'.

[29] On the evidence, I find that D1D2 owed a duty of care to the plaintiffs, as I find that there was a solicitor-client relationship between them and the plaintiffs. The evidence that support my finding are as follows.

FIRST ISSUE: DUTY OF CARE — THE EVIDENCE

The intitulement on the writ in Suit 130 discloses that the plaintiff in Suit 130 is the estate, namely the beneficiaries

[30] First, the RM350,000 compensation money was the result of the successful litigation in Suit 130. The intitulement on the writ in Suit 130 states that the plaintiff in Suit 130 was the 'Harta Pesaka Allahyarham Haji Omar bin Arshad @ Omar bin Chat (melalui Hj. Baharul Azhar bin Omar sebagai wakil waris-waris yang sah)', which is the estate.

[31] It is a fact that Baharul Azhar was never formally appointed as the administrator of the estate. Until the present day, the estate does not have a court-appointed administrator. During oral submissions, D1 himself and counsel for D2 agreed that Baharul Azhar was not the formal administrator of the estate. It was also agreed that Baharul Azhar was the beneficiaries' representative to prosecute Suit 130.

[32] I find that the plaintiff in Suit 130 was clearly not Baharul Azhar in his personal capacity. Instead, the plaintiff was the estate, and Baharul Azhar was named only as the representative of the beneficiaries of the estate. In other words, Suit 130 was brought for the benefit of the beneficiaries of the estate.

The statement of claim in Suit 130 was prepared by D1

[33] Second, the statement of claim in Suit 130 was prepared by D1, together with Encik Mohd Zawahid, the principal lawyer in Tetuan Zawahid. D1 admitted to this in cross-examination (refer Notes of Evidence (NOE), encl 126, at p 157):

> SA: En Zul, saya pohon untuk kamu rujuk kepada muka surat 7 sehingga muka surat 16, Bundle B. Itu merupakan writ saman dan penyata tuntutan *bagi Kes 22-130-2007*.
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> D1: *Betul.*
>
> SA: Kamu setuju saya katakan bahawa *kamu mempunyai pengetahuan berhubung writ saman dan penyataan tuntutan ini*?

D1: *Setuju*.

SA: Dan kamu juga setuju saya katakan bahawa *kamu yang sediakan writ saman dan penyataan tuntutan ini bersama-sama dengan En Zawahid*?

D1: *Betul, setuju*.

SA: Rujuk kepada muka surat 7, En Zul. Kita lihat kepada tajuk kepada intitulement tersebut , 'Harta pusaka Allahyarham Haji Omar Bin Arshad @ Omar Bin Chat, melalui Haji Baharul Azhar Bin Omar sebagai wakil waris-waris yang sah'. Setuju bahawa Baharul Azhar adalah wakil waris-waris yang sah?

D1: *Setuju*.

[34] I find that since it was D1 who prepared the Statement Of Claim, together with Encik Mohd Zawahid, D1 knew or should have known that the plaintiff in Suit 130 was the estate (the beneficiaries), not Baharul Azhar.

The Sijil Faraid discloses ten beneficiaries of the estate

[35] Third, the *Sijil Faraid* for the estate contains a list of ten named beneficiaries. The *Sijil Faraid* was given to Encik Mohd Zawahid, and D1 sighted it. D1 hence had the knowledge that the estate had ten beneficiaries, which included the plaintiffs. This is the oral evidence that came out during D1's cross-examination (refer NOE, encl 126, p 161):

SA: Saya rujuk kamu kepada muka surat 40, Ikatan B. Page 40 Yang Arif, Bundle B, iaitu Sijil Faraid. Kamu setuju dengan saya Sijil Faraid ini telah diberikan kepada kamu semasa penyediaan writ saman dan penyataan tuntutan 22-130-2007?

D1: Diberikan kepada En Zawahid.

SA: Ya, kamu mempunyai pengetahuan sebab kamu menyediakan bersama-sama dengan En Zawahid. Soalan saya, kamu setuju atau tidak Sijil Faraid ini telah diberikan oleh Baharul Azhar kepada kamu semasa penyediaan writ saman dan penyataan tuntutan 22-130-2007?

D1: *Saya ada tengok*.

SA: Jadi kamu setujulah. Setuju, ya?

D1: *Saya ada tengok sijil ini*.

SA: Memandangkan jawapan kamu, kamu ada tengok ya En Zul. Jadi *kamu setuju bahawa dalam Sijil Faraid ini terdapat 10 nama bagi harta pusaka Omar Bin Arshad, setuju*?

D1: *Setuju*.

[36] The *Sijil Faraid* is reproduced here. It discloses that there are ten beneficiaries to the estate and their respective shares (proportions) in the estate:

40

... PULAU PINANG xxxxx 612500/707
xxxxx

PEJABAT KADI ...
PULAU PINANG.

Bil. No. JUPP.892/186/88

Bayaran Yang Dijelaskan $20.00
No. Resipi 5192
Tarikh 12/12/88

SIJIL FARAID

Harta Pesaka: OMAR BIN ARSHAD

yang telah meninggal dunia pada: 3.9.1988

Mengikut kuasa yang diberi oleh Seksyen 43 Undang-Undang Pentadbiran Ugama Islam Negeri Pulau Pinang Tahun 1959, maka di bawah ini diperturunkan pembahagian faraid mengikut Hukum Syarak atas harta pesaka simati yang tersebut di atas yang telah dipinta oleh: Bahrul Azhas @ Baharul Azhar bin Omar
No.293, Balik Pulau Village Area, Balik Pulau, P.Pinang.

Surat Bil: bertarikh

Nama		Pembahagian
1. Khadijah bt. Hj. Puboh	-	15/120 Bahagian
2. Siti Nurhaneem bt. Omar	-	7/120 "
3. Baharul Anuar bin Omar	-	14/120 "
4. Bahrul Azhas @ Baharul Azhar bin Omar	-	14/120 "
5. Siti Noor Halma bt. Omar	-	7/120 "
6. Baharul Akmar bin Omar	-	14/120 "
7. Baharul Asrar bin Omar	-	14/120 "
8. Siti Noor Hana bt. Omar	-	7/120 "
9. Baharul Azman bin Omar	-	14/120 "
10. Baharul Azidi bin Omar	-	14/120 "

KADI BESAR
NEGERI PULAU PINANG

Bertarikh: 20.1.1989

Dikeluarkan di bawah tandatangan saya dan cop Mohor.

S/N R3iGoGYEykOPbeQ0fM/NA
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[37] The *Sijil Faraid* was given to Tetuan Zawahid. Tetuan Zawahid's clients were the beneficiaries.

[38] D1 sighted the *Sijil Faraid*. So, just as the beneficiaries were Tetuan Zawahid's clients, the beneficiaries were D1's clients too.

Tetuan Zawahid was appointed by the beneficiaries to act for them

[39] Fourth, at the beginning, in 2005, the beneficiaries, through Baharul Azhar, appointed Tetuan Zawahid to work with their then-solicitors: Messrs Pushpam & Co (Messrs Pushpam).

[40] On behalf of the beneficiaries, Baharul Azhar wrote a letter dated 30 November 2005 (November 2005 letter), where he wrote, under his name: 'dan bagi pihak 9 orang yang lain', to Tetuan Zawahid, appointing Encik Mohd Zawahid as counsel, to work with Messrs Pushpam, to obtain compensation for the estate. This is the letter of appointment to represent the beneficiaries for the purpose of filing Suit 130.

[41] It is evident by this November 2005 letter that the beneficiaries appointed Tetuan Zawahid to represent them. It was not to represent only Baharul Azhar.

[42] This November 2005 letter is reproduced here:

(the remainder of this page is intentionally left blank)

95

BAHARUL AZHAR BIN OMAR
(dan bagi pihak 9 yang lain)
67 Persiaran Mayang Pasir
11950 Bayan Baru
Pulau Pinang 04-6436250

30 November 2005

Tetuan Mohd Zawahid & Co.
Advocates & Solicitors
L-111, First Floor
Jalan PJU 10/2A
Damansara Damai
47830 Petaling Jaya
Selangor Darul Ehsan

(U/P: Encik Mohd Zawahid Bin Ya)

Tuan,

PER : PERLANTIKAN SEBAGAI PEGUAMCARA (COUNSEL)
(BAGI MEMBANTU TETUAN PUSHPAM & CO.)
BERHUBUNG TUNTUTAN GANTIRUGI HARTA
PUSAKA OMAR BIN ARSHAD @ OMAR BIN CHAT

Dengan segala hormatnya saya merujuk kepada perkara di atas.

Kami adalah dengan ini sepakat melantik Encik Mohd Zawahid Bin Ya daripada Tetuan Mohd Zawahid & Co. bagi mengendalikan kes kami bersama-sama Tetuan Pushpam & Co. termasuklah menghadiri mesyuarat serta perbincangan dengan mana-mana pihak berkenaan dan juga menghadiri sebarang perbicaraan di Mahkamah sebagai peguamcara pembantu (Counsel).

Kami juga dengan ini membuat akujanji akan membayar segala kos guaman dan sebarang perbelanjaan Tetuan Mohd Zawahid & Co. dalam mengendalikan kes ini.

Sekian, terima kasih

Yang Benar

.....
BAHARUL AZHAR BIN OMAR
NO. K/P : 4186694

s/k **Tetuan Puspam & Co.**
120A, Tingkat 1 Jalan Raja Musa Aziz
30300 Ipoh Perak Darul Ridzuan

[43] Another piece of documentary evidence that reinforces this fact of representation was Tetuan Zawahid's letter of 25 May 2006 to Messrs Pushpam (May 2006 letter). About five months after the November 2005 letter, the beneficiaries instructed Tetuan Zawahid to take over the conduct of the case from Messrs. Pushpam. The third paragraph of the May 2006 letter states that Tetuan Zawahid 'have been instructed by the beneficiaries' of the estate to take over conduct of the matter.

[44] The May 2006 letter is reproduced here:

96

MOHD ZAWAHID & CO.
ADVOCATES & SOLICITORS
UG-05, EMERALD PLAZA EAST, JALAN PJU 8/3, DAMANSARA PERDANA, 47820 PETALING JAYA
SELANGOR DARUL EHSAN PHONE: 03-7713 3292 FAX: 03-7713 3291 e-mail: mdzawahidhjya@hotmail.com

MOHD ZAWAHID HAJI YA, LL.B (Hons) IIUM
ZULHASMI BIN ZAKARIA, LL.B (Hons) IIUM

Our ref : MZC/Lit/24/05
Your ref :
Date : 25th May 2006

MESSRS PUSHPAM &CO
120A, Tingkat 1,
Jalan Raja Musa Aziz,
30300 Ipoh,
Perak Darul Ridzuan

URGENT

FAX/POST
05-2538334

[Attn: Miss Pushpam Subramaniam]

Re: **HARTA PUSAKA ALLAHYARHAM HAJI OMAR BIN ARSHAD @ OMAR BIN CHAT.**
LOT 98 (111) Mukim F, Kongsi, Balik Pulau, Pulau Pinang.

We refer to the above matter and our letter dated December 7, 2005.

Kindly advice us on the status of the above mentioned.

Kindly be informed that we have been instructed by the beneficiaries of the above Allahyhram Haji Omar Bin Arshad to take over the conduct of the above matter from your good office.

We are much obliged if your good office could revert to us within seven (7) days from the date of this letter as to whether or not your good office has any objection to the same.

In the event should your good office has no objection to the above, kindly forward all the documents pertaining to the above matter to us or to Tuan Haji Baharul Azhar Bin Haji Omar personally.

Your immediate attention and response to this matter is highly appreciated.

Thank you,

Yours faithfully,

Mohd Zawahid & Co.

MOHD ZAWAHID & CO.

Please Quote Our Reference When Replying * Working Hours 8-30 am to 6-00 pm Monday to Friday

[45] D1, as the solicitor who had conduct of Suit 130, would have had access to, and should have had knowledge of, the terms of this appointment, which is that Baharul Azhar, on behalf of the nine other beneficiaries, appointed Tetuan Zawahid to act for them. This is an irresistible fact. I find, on the balance of probabilities, that it was the beneficiaries who appointed Tetuan Zawahid, perhaps with Baharul Azhar as the spokesperson. The beneficiaries were the clients, not Baharul Azhar alone.

When D1D2 took over the case, they represented the beneficiaries, not Baharul Azhar alone

[46] Fifth, Encik Mohd Zawahid of Tetuan Zawahid testified that it was the family (the beneficiaries of the estate) who appointed him to act for them. He represented the family. Although only a few of the family members met with him, he testified that he represented the whole family (refer NOE, encl 124, p 285):

> SA: *Jadi perwakilan* pada permulaan penyataan tadi, *your appointment was made by the family?*
>
> ZAWAHID: *Dikatakan Yang Arif, berdasarkan kepada famili* tapi yang hadir adalah Baharul Azhar dan juga Nizam Hairil,
>
> YA: Ok.
>
> SA: En Zawahid, *boleh kamu sahkan bahawa kamu sebagai peguamcara peguam keluarga simati Hj Omar Bin Arshad perlu mendapat arahan daripada ahli keluarga sebelum kes Mahkamah tersebut dipersetujui? Boleh kamu sahkan penyataan ini*?
>
> ZAWAHID: *Boleh*.

[47] When Encik Mohd Zawahid was appointed, it was clear to him that the instructions for him to act did not come from Baharul Azhar alone. He knew that the instructions came from the beneficiaries. This is what he testified (refer NOE, encl 126, pp 312–313):

> ZAWAHID: Ada pada permulaannya Yang Arif, pada masa itu *adalah yang datang jumpa saya adalah Baharul Azhar*, Yang Arif.
>
> YA: Ok. Bersama dengan Norazmi? Apa nama dia? Nizam?
>
> ZAWAHID: Nizam Hairil.
>
> YA: Bersama dengan dia?
>
> ZAWAHID: Ya.
>
> YA: Dan tahu tak En Zawahid *apa peranan dia*?
>
> ZAWAHID: *Dia akan berbincang dengan yang lain-lain termasuk mak dia, Baharul Akmar, Arwah Khadijah Bt Puteh dan juga, yang tidak dinyatakan di sini, ada lagi tiga orang lagi*, Yang Arif.
>
> YA: Jadi dari mula lagi ada lima orang yang datang jumpa dengan En Zawahid?
>
> ZAWAHID: Tidak, Yang Arif. Yang datang berjumpa hanyalah Nizam dengan Baharul Azhar, *tapi disampaikan bahawa orang yang lain-lain itu ada berbincang dalam perbincangan mereka.*
>
> YA: Dan adakah En Zawahid diberitahu yang *arahan datang daripada mereka atau dari siapa*?
>
> ZAWAHID: *Saya boleh mengatakan bahawa mesti, semestinya, ada arahan daripada sebilangan besar, boleh dikatakan*, Yang Arif. Sebab ada yang tidak participate daripada awal.

YA: Termasuk siapa, nama-nama mereka?

ZAWAHID: Siri Noor Halma, Baharul Akmar, Arwah Khadijah Bte Hj Puteh.

[48] And if Tetuan Zawahid represented the family (the beneficiaries of the estate), then when D2 took over the conduct of Suit 130, and D1 handled the case, it is reasonable to conclude that D1D2 took over the conduct of the case from Tetuan Zawahid *on the same terms of representation* as for Tetuan Zawahid.

The beneficiaries contributed towards D1D2's bill and D1D2 knew about it

[49] Sixth, in July 2010, D1D2 issued a bill dated 15 July 2010 for RM975. D1D2 issued it to Baharul Azhar.

[50] A couple of days after the bill was issued, Baharul Azhar wrote a letter dated 17 July 2010 to inform his fellow beneficiaries and to ask them to respectively contribute towards the payment of the bill. It must be noted here that a copy of this letter was extended to D2 (It was 'cc-ed' to D2).

[51] A month later in August 2010, Baharul Azhar wrote a reminder dated 18 August 2010 to his fellow beneficiaries to ask for their urgent contribution to pay D2's bill. Again, a copy of this reminder was extended to D2.

[52] As these two letters were extended to D2, I find, on the balance of probabilities, that D1D2 knew or should have known that the beneficiaries were paying for their services ie paying their bill. I find that these two letters infer and impute on D1D2 a solicitor-client relationship with the beneficiaries.

First issue: Duty of care — Findings

[53] Under the first issue, I find D1D2's plea that they were appointed by Baharul Azhar; that they took instructions from and communicated only with Baharul Azhar; that they owed no duty of care to the plaintiffs — to be untenable.

[54] I find that D1D2 owed a duty of care to the plaintiffs to protect the plaintiffs' interests and rights over the RM350,000 compensation money , as there was a solicitor-client relationship between them.

SECOND ISSUE — DID D1D2 BREACH THEIR DUTY OF CARE WHEN THEY PAID THE COMPENSATION MONEY TO BAHARUL AZHAR AND DEDUCTED THEIR OWN FEES?

[55] On the evidence, I find that D1D2 breached their duty of care when they paid the RM350,000 compensation money to Baharul Azhar and deducted their own fees. The evidence that lead me to this finding is set out below.

Second Issue: Breach of duty of care — The evidence

D2 admitted that all the beneficiaries have rights over the compensation money

[56] Firstly, the principal partner in D2: Encik Ahmad Termizi, admitted in cross-examination that all the beneficiaries have their respective rights to the RM350,000 compensation money. In other words, the RM350,000 compensation money from Suit 130 was for *all* the beneficiaries:

> RO: Setuju saya katakan bahawa writ saman 22–130–2007 dan *perintah persetujuan* yang direkodkan atas nama Allahyarham Haji Omar Bin Arshad *adalah dibuat di atas kapasiti wakil waris-waris*?
>
> AHMAD: *Ya, setuju*.
>
> RO: Jadi setuju saya katakan *wang pampasan tersebut adalah hak bersama waris-waris*?
>
> AHMAD: *Ya, setuju* berdasarkan perintah 22–130

[57] From this admission, I find that even though D2 acknowledged that the RM350,000 compensation money belonged to the beneficiaries, D1D2 nevertheless chose to release RM295,000 to Baharul Azhar. I find this conduct to be either a negligent act or a negligent omission.

[58] It was a negligent act in the sense that D1D2 should have protected the interests of the respective beneficiaries (who were their clients) over the compensation money, but they did not. It was a negligent omission in the sense that D1D2 failed to protect the beneficiaries' rights to the compensation money.

D1D2 were notified that the plaintiffs sought their share of the RM350,000 compensation money, and yet did not give them the money

[59] Secondly, although the beneficiaries notified D1D2 about their rights to the RM350,000 compensation money, D1D2 ignored their notice.

[60] On 18 August 2010, Baharul Azhar wrote a letter to all the ten beneficiaries of the estate (including himself), to ask each beneficiary to pay their share of RM97.50 to D2, to settle D2's bill for RM975. All the ten beneficiaries' names were stated in the letter. And the letter was copied to D2.

[61] This letter reinforces the fact that D1D2 knew that the plaintiff in Suit 130 was the estate, and therefore the RM350,000 compensation money, which constituted the beneficiaries' winnings from the Suit 130 litigation, was for the benefit of the beneficiaries.

[62] On 25 August 2010, the presiding court in Suit 130 recorded a consent order for the payment of the RM350,000 compensation money to the estate.

[63] On 30 December 2010, Tetuan Zawahid, on behalf of the plaintiffs and other beneficiaries of the estate, wrote a letter dated 30 December 2010 to D2, for the attention of D1, demanding for their clients' share of the RM350,000 compensation money (December 2010 letter). D1D2 ignored the December 2010 letter.

[64] Despite being so notified, and unbeknown to the plaintiffs, on 9 December 2011, a year later, D1D2 paid out to Baharul Azhar RM295,000 of the RM350,000 compensation money, as well as paid themselves the balance RM55,000 in legal fees and expenses.

The plaintiffs and other beneficiaries demanded for the compensation money

[65] Thirdly, as there was no response to the December 2010 letter, Tetuan Zawahid issued a letter dated 4 January 2012 to D2, again to the attention of D1 (January 2012 letter) (Note: On the face of the letter, it was erroneously dated 4. October 2011, but at the trial the parties agreed that the correct date was 4 October 2012). This January 2012 letter again demanded for the RM350,000 compensation money, without any deductions, to be paid to the beneficiaries within 48 hours of receiving the letter.

[66] D1D2 disregarded the January 2012 letter of demand, as they had already issued the RM295,000 cheque in Baharul Azhar's name, and deducted the balance RM55,000 as fees and expenses, without the beneficiaries' consent.

There was no documentary evidence authorising D1D2 to take instructions only from Baharul Azhar or to pay the compensation money solely to Baharul Azhar

[67] Fourthly, D1D2 did not produced any evidence to prove, or for an inference to be drawn, that they were instructed by the beneficiaries to take

instructions only from Baharul Azhar, or that they were authorised to release any monetary remedy from Suit 130 solely to Baharul Azhar.

[68] For instance, D1D2 could have got, but did not get, a letter from the beneficiaries that instructed D1 or D2 to take instructions from Baharul Azhar relating to the conduct of Suit 130, or to pay the RM350,000 compensation money to Baharul Azhar.

[69] D1 admitted to this in cross-examination (NOE, encl 126, pp 162–163):

> SA: Kamu setuju dengan saya kamu tidak ada surat untuk memaklumkan waris-waris lain tentang duit yang kamu telah terima, duit pampasan yang telah kamu terima, setuju?
>
> WSW: Maklumkan kepada En Baharul Azhar?
>
> SA: Soalan saya, *kamu tidak maklumkan kepada waris-waris yang lain*. Setuju?
>
> D1: *Setuju*.
>
> SA: Saya ulang sekali lagi soalan saya. *Semasa kamu melepaskan wang pampasan tersebut kepada En Baharul Azhar, kamu tidak meminta surat kuasa dari beliau* untuk menerima wang daripada, *untuk menerima wang bagi pihak wakil-wakil waris yang lain.* Setuju atau tidak?
>
> D1: Tak setuju.
>
> SA: Tak setuju?
>
> D1: *Setuju*.

There was no evidence that D1D2 obtained the beneficiaries' consent to deduct RM55,000 from the RM350,000 compensation money

[70] Fifthly, there is no documentary nor oral evidence that D1D2 procured the beneficiaries' consent to deduct RM55,000 from the RM350,000 compensation money as legal fees and expenses.

[71] Similarly, D1D2 could have got, but did not get, a letter from the beneficiaries consenting to the deduction of RM55,000 as legal fees and expenses. Or, D1D2 could have, but did not communicate to the beneficiaries that they were deducting RM55,000 from the RM350,000 compensation money.

There was no bill from D2 for RM55,000

[72] Sixthly, Encik Ahmad Termizi verified that the balance RM55,000 was paid out (or deducted) from the RM350,000 compensation money, for legal

fees and expenses (refer NOE, encl 126, p 215):

> RO: En Termizi, setuju saya katakan wang yang dikeluarkan kepada Baharul Azhar adalah sebanyak 295,000 berdasarkan kepada cek di muka surat 22, betul?
>
> AHMAD: Betul.
>
> RO: Jadi kita ada baki dalam 55,000?
>
> AHMAD: Ya, betul.
>
> RO: Sebagai fees guaman dan juga perbelanjaan. Sila sahkan?
>
> AHMAD *Ya, saya sahkan 55,000 adalah pembayaran baki guaman*.

[73] From the documentary evidence, D2 issued two bills. One was Bill No 74/09 dated 3 November 2009 for RM5,200. The other was Bill No 40/10 dated 15 July 2010 for RM975. But there was no bill for the RM55,000 for legal fees and expenses.

[74] There was, however, a receipt for RM52,500 issued by D1 under D2's letterhead. This receipt was issued to Baharul Azhar, but not to either the estate or the beneficiaries.

The presiding court in Suit 105 (by the plaintiffs against Baharul Azhar) made a finding that Baharul Azhar was merely a representative of the beneficiaries

[75] Seventhly, when the RM350,000 compensation money was not paid out to be shared by the beneficiaries of the estate, four of the beneficiaries (including the plaintiffs) filed Penang High Court Suit 22NCVC-105–07 of 2014 (Suit 105) against Baharul Azhar, as the money was paid only to him and he refused to share it with the other beneficiaries.

[76] The plaintiffs in Suit 105 were Khadijah bt Hj Puteh (the mother-widow), and Baharul Akmar bin Omar, Baharul Azman bin Omar and Siti Noor Halma bt Omar. They sued Baharul Azhar.

[77] The presiding Court in Suit 105 made a finding of fact that in Suit 130, Baharul Azhar was the *representative* of the beneficiaries of the estate: see para 16 of the presiding court's grounds of judgment:

> Hence, based on the writ and statement of claim of Civil Suit 22–130 of 2007 (Suit 130), the defendant here (Baharul Azhar in Suit 105) acted as the plaintiff there (Baharul Azhar in Suit 130) *as a representative of the beneficiaries on behalf of the estate of the late Haji Omar bin Chat and not in his personal capacity as claimed*. (Notes and emphasis added.)

[78] Baharul Azhar was not a party to Suit 130 in his personal capacity. In other words, in Suit 130, he did not sue in his personal capacity. He sued merely in his capacity as the informal representative of the beneficiaries of the estate, but not as the formal court-appointed legal representative of the estate. I agree with this finding of fact.

D1D2 did not notify Baharul Azhar that the RM295,000 was to be distributed among the beneficiaries

[79] Eighthly, D1D2 could have notified, but did not notify Baharul Azhar that the compensation money was for the estate or the beneficiaries. Such a notice to Baharul Azhar would have placed an obligation on him to share the money with the other beneficiaries. But D1D2 did not do this, or cause it to be done.

Baharul Azhar amended the intitulement on the writ of Suit 130 to reflect that he is the plaintiff in Suit 130

[80] Ninthly, I would like to mention a piece of evidence that, although it does not bear heavily on my judgment here, discloses an inference that reinforces my finding that D1D2's clients in Suit 130 were the beneficiaries of the estate and not Baharul Azhar alone.

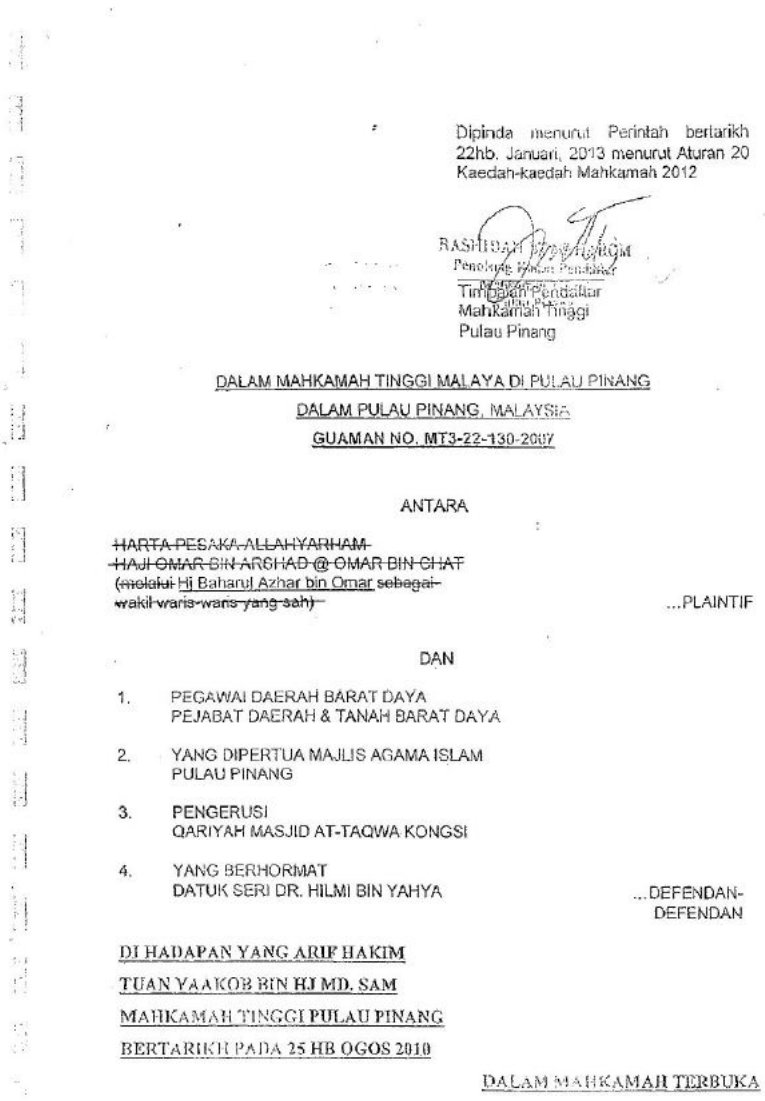
[81] Baharul Azhar, quite after-the-event, in January 2013 (*after* D1D2 had paid the RM295,000 to him and deducted the RM55,000 for themselves in December 2011), applied to *amend the intitulement* of the order dated 25 August 2010 — the order to pay the estate the RM350,000 compensation money.

[82] On the intitulement of the order, the named plaintiff was amended from 'Harta Pesaka Allahyarham Haji Omar bin Arshad @ Omar bin Chat (melalui Hj Baharul Azhar bin Omar sebagai wakil waris-waris yang sah)' — to 'Baharul Azhar bin Omar'. The amendment was allowed by court order dated 22 January 2013.

[83] The RM350,000 compensation money was already paid out by then. It was paid out in December 2011. The amendment was granted in January 2013, more than a year after the RM350,000 was paid out by D1D2.

[84] I must point out, however, that the amendment was not applied for by D1D2. It was applied for by a firm called Tetuan Zamri Ibrahim & Co, who represented Baharul Azhar.

[85] The amended intitulement is reproduced here:



19

Dipinda menurut Perintah bertarikh 22hb. Januari, 2013 menurut Aturan 20 Kaedah-kaedah Mahkamah 2012

RASHIDAH [illegible]
Penolong Kanan Pendaftar
Tinggian Pendaftar
Mahkamah Tinggi
Pulau Pinang

DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG
DALAM PULAU PINANG, MALAYSIA
GUAMAN NO. MT3-22-130-2007

ANTARA

~~HARTA PESAKA ALLAHYARHAM HAJI OMAR BIN ARSHAD @ OMAR BIN CHAT (melalui Hj Baharul Azhar bin Omar sebagai wakil waris-waris yang sah)~~ ...PLAINTIF

DAN

1. PEGAWAI DAERAH BARAT DAYA
PEJABAT DAERAH & TANAH BARAT DAYA
2. YANG DIPERTUA MAJLIS AGAMA ISLAM
PULAU PINANG
3. PENGERUSI
QARIYAH MASJID AT-TAQWA KONGSI
4. YANG BERHORMAT
DATUK SERI DR. HILMI BIN YAHYA ...DEFENDAN-DEFENDAN

DI HADAPAN YANG ARIF HAKIM
TUAN YAAKOB BIN HJ MD. SAM
MAHKAMAH TINGGI PULAU PINANG
BERTARIKH PADA 25 HB OGOS 2010

DALAM MAHKAMAH TERBUKA

[86] I cannot help but think that in all likelihood, Baharul Azhar instructed Tetuan Zamri Ibrahim & Co to seek the amendment, in an attempt to 'legitimise' the payment of the compensation money to himself. This infers and reinforces to me that more likely than not, Suit 130 was filed to procure compensation for *all* the beneficiaries, and certainly not for Baharul Azhar alone. But Baharul Azhar absconded with the whole compensation sum. And D1D2, as solicitors, should have known that they represented the beneficiaries and owed them a reasonable duty of care to protect their rights to the compensation money.

Second issue: Breach of duty of care — Findings

[87] Even though D1D2 met with and communicated with Baharul Azhar, as they were the solicitors for the estate (and ultimately the beneficiaries), D1D2 owed a duty to take reasonable care in relation to the beneficiaries. The duty to take reasonable care includes the duty to ensure that the RM350,000 compensation money is paid to the estate or to the beneficiaries.

[88] Paying the RM295,000 solely to Baharul Azhar is, in my view, a breach of D1D2's reasonable duty of care.

[89] D1D2's failure or refusal to pay the compensation money to the beneficiaries directly caused the beneficiaries to suffer loss and damage. The beneficiaries were deprived of their share of the money.

[90] This loss or damage was not too remote. D1D2's act of releasing RM295,000 solely to Baharul Azhar and taking RM55,000 as their legal fees and expenses are the two foreseeable and causational events that deprived the beneficiaries of the compensation money.

THIRD ISSUE — HOW MUCH ARE D1D2 LIABLE FOR IN DAMAGES?

[91] As I find that D1D2 were negligent, it follows that they are liable to the plaintiffs for damages. It is trite that the purpose of damages is to put the plaintiffs back in the same position that they were in, as if D1D2 were not negligent.

[92] If D1D2 were not negligent, the plaintiffs would have been given their respective share of the RM350,000 compensation money. So, the starting point in assessing damages to compensate the plaintiffs is to determine how much money they would have been given.

Third issue: Damages — Findings

[93] The evidence that lead me to the amount of damages to award the plaintiffs is the *Sijil Faraid*. The *Sijil Faraid* specifies that P1 (the estate of Khadijah bt Hj Puteh) has a 15/120 share in the estate, and P3 (Baharul Azman bin Omar) has a 14/120 share in the estate.

[94] These two fractions work out to RM43,750 for P1 and RM40,833.33 for P3. I accordingly award these respective amounts to P1 and P3.

[95] Next, there is a table of payments made by the beneficiaries to prosecute

Suit 130. The Table is described as the 'Rumusan Kutipan Dan Bayaran'. D1D2 agreed that P1 paid RM1,800 and P3 paid RM300.

[96] As for interest, since D1D2 paid out the RM295,000 to Baharul Azhar on 9 December 2011, I order interest for the benefit of the plaintiffs, at 5%pa on the respective amounts, to be calculated from 9 December 2011 to the date of full payment.

[97] This means that for P1, I order the payment of 5%pa on RM43,750. from 9 December 2011 to the date of full payment, and 5%pa on RM1,800 also from 9 December 2011 to the date of full payment.

[98] For P3, I similarly order the payment of 5%pa on RM40,833.33 from 9 December 2011 to the date of full payment, and 5%pa on RM300 also from 9 December 2011 to the date of full payment.

[99] As for general damages, I find that the plaintiffs did not produce or give any evidence of the quantum of damages that they suffered. The only evidence available was that P1 passed away in December 2020, and that she did not get to enjoy the use of the compensation money from the time that it was paid out in December 2011, to December 2020 when she passed away. And similarly for P3 — he did not get to enjoy the use of the money from December 2011.

[100] As there is no evidence of any suffering, I award RM1,000 as nominal damages to P1, and RM1,000 as nominal damages to P3 as well.

AGGRAVATED DAMAGES

[101] The plaintiffs also prayed for aggravated damages to be ordered against D1D2.

[102] The principles governing an award of either or both aggravated and exemplary damages were propounded in the celebrated case of *Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129; [1964] 2 WLR 269 (HL).

[103] Aggravated damages are additional damages for the injury to the plaintiffs' feelings, which were caused specifically by any bad and dishonourable conduct on the part of D1D2. The conduct that I am to assess is D1D2's conduct in committing the wrong that is the subject matter of this suit ie the negligence, as well as D1D2's conduct throughout this suit.

[104] The manner of bad and dishonourable conduct that warrants aggravated damages has been described as conduct that is accompanied by

malevolence (nastiness), spite (hate), insolence (disrespect), malice (ill will) and arrogance (pride).

[105] I am guided by the judgment of the High Court in *Big Junkyard Sdn Bhd & Anor v Chan Kah Wai* [2022] MLJU 2923; [2023] 1 CLJ 564; [2022] AMEJ 1566, HC, where Justice Amarjeet Singh Serjit Singh lucidly summarises the principles relating to aggravated damages, in this manner:

> [41] Thus, aggravated damages are given as additional compensation where there is injury to the feelings of the plaintiff that is caused by or exacerbated as a result of exceptional conduct of the defendant. The conduct must be high-handed or malicious act or an act done in an oppressive manner. Mere wrongful conduct is not sufficient. *There must be something exceptional in the act that was done*. The matter was lucidly stated by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at page 1232 as follows:
>
> > I doubt whether the facts disclosed in the summing up shows even a case for aggravated damages ... present there seems to be *no evidence that the Respondents were motivated by malevolence or spite* against the appellant ... Again in so far as disclosed in the summing up there was *no evidence of offensive conduct or of arrogance or insolence,* (Emphasis added.)
>
> [42] The principles stated above show that there are *two elements* relevant to the availability of an award for aggravated damages: *firstly, exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong; secondly, intangible loss suffered as a result by the plaintiff, that is injury to feelings or personality* ... (Emphasis added.)

[106] I find that D1D2 have exhibited or demonstrated no bad or dishonourable conduct against the plaintiffs. There is no evidence to disclose otherwise.

[107] During the trial, D1D2 conducted themselves courteously and appropriately. In fact, I find that D2's principal lawyer: Encik Ahmad Termizi to be forthright when he was answering cross-examination questions.

[108] I see no evidence nor ground to invoke the exceptional measure of ordering aggravated damages as an additional remedy. I therefore make no award for aggravated damages.

EXEMPLARY DAMAGES

[109] The plaintiffs prayed for exemplary damages against D1D2 as well.

[110] Exemplary damages are damages that would be ordered against D1D2 to punish them, to deter them, or to show the court's displeasure towards their

behaviour. It is an exceptional remedy, and are only awarded under 'very exceptional circumstances' — see *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors And Another Appeal* [2005] 6 MLJ 540; [2005] 5 AMR 185; [2005] 3 CLJ 753 (CA).

[111] I go back to *Big Junkyard* for an apt enunciation of the principles governing the award of exemplary damages:

> [43] The next issue is whether a case for exemplary damages has been made out. *The purpose of exemplary damages is to show the court's abhorrence to 'outrageous' conduct which conduct or behaviour is punishable*. The purpose is to punish the defendant. There are two parts in granting exemplary damages. The first part is to clear the threshold. The plaintiff has to first show that he falls within one of the three categories enunciated in *Rookes v Barnard* (recently reiterated by the Federal Court in *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365 and *Tenaga Nasional Bhd v Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179).
>
> [44] The failure to cross this threshold is fatal for a claim for exemplary damages. The three categories are:
>
> (i) oppressive, arbitrary or unconstitutional action by the servant of the government; or
>
> (ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; or
>
> (iii) where exemplary damages is expressly authorised by statute.
>
> [45] *Once the plaintiff has cleared this threshold the plaintiff must show 'outrageous' conduct*. The principle is stated by Lord Devlin in *Rookes v Barnard as follows:*
>
> > In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to *punish him for his outrageous conduct* and to deter him from repeating it, then it can award some larger sum. (Emphasis added.)
>
> [46] The Court of Appeal in *Sambaga Valli* gave a description of what may amount to 'outrageous' punishable conduct:
>
> > [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable -are additional damages *awarded with reference to the conduct of the defendant,* to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. *Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff.* The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may aiso *[sic]* have an important

function in vindicating the rights of the plaintiff.

[47] If this part is cleared, only then the court goes into the question of assessing the measure of exemplary damages to be awarded ... (Emphasis added.)

[112] I find that in this suit, there is no such 'very exceptional circumstance' that warrants an award of exemplary damages against D1D2.

[113] The plaintiffs submit that D1D2 caused the plaintiffs to be deprived of their share of the RM350,000 compensation money. They argue that they have been deprived of the money for a long while, namely, from August 2010 (the order of 25 August 2010) until February 2023 (the present day). They contend that even though the beneficiaries, through the December 2010 letter, notified D1D2 that the beneficiaries must be given their rightful share of the RM350,000 compensation money, D1D2 still refused to release the money to them.

[114] I am of the view that these factors that are put forth are the circumstances that constitute the vicissitudes of litigation. D1D2 have to be given the opportunity, in fact, the right, to vigorously defend their position against the plaintiffs' claim. And so I hold that D1D2 should not be punished for it.

CONCLUSION

[115] In conclusion, for the reasons set out above, I allow the plaintiffs' claim in the following terms:

(a) D1D2 are to pay P1 the sum of RM43,750, with interest on this amount at 5%pa from 9 December 2011 until the date of full payment;

(b) D1D2 are to pay P1 the sum of RM1,800, with interest on this amount at 5%pa from 9 December 2011 until the date of full payment;

(c) D1D2 are to pay P1 the sum of RM1,000, with interest on this amount at 5%pa from the date of judgment (29 March 2023) until the date of full payment;

(d) D1D2 are to pay P3 the sum of RM40,833.33, with interest on this amount at 5%pa from 9 December 2011 until the date of full payment;

(e) D1D2 are to pay P3 the sum of RM300, with interest on this amount at 5%pa from 9 December 2011 until the date of full payment;

(f) D1D2 are to pay P3 the sum of RM1,000, with interest on this amount at 5%pa from the date of judgment (29 March 2023) until the date of full payment; and

(g) D1D2 are to pay P1 and P3 costs of RM70,000, which are subject to the allocatur.

Claim allowed.

Reported by Ahmad Ismail